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IN THE

Supreme Court of the United States

October Term, 1972

No. 73-284

AMALGAMATED LOCAL UNION 355,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD and VANELLA BUICK OPEL, INC.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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May 30, 1973

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Amalgamated Local Union 355 prays that a *Writ of Certiorari* issue to review the Judgment of the United States Court of Appeals for the Third Circuit, entered April 3, 1973, which granted enforcement of an Order of the National Labor Relations Board.

Opinions Below

There was no formal opinion of the Circuit Court of Appeals; the Judgment Order, a true copy of which is annexed hereto as Appendix A, merely grants enforcement without opinion. The Decision and Order of the National Labor Relations Board, dated December 28, 1971, annexed hereto as Appendix B, is reported at 194 NLRB No. 123.

Jurisdiction

The Judgment of the Circuit Court of Appeals was entered on April 3, 1973. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

Questions Presented

1. May the National Labor Relations Board proscribe without any limitations as to time and area, the conduct of a labor organization?

2. Does the Order of the National Labor Relations Board deprive petitioner of due process when it prevents future Union activity before finding that such activity is improper, and by so doing, place a labor organization under the ban of outlawry without further hearing?

Constitutional Provisions Involved

U.S. CONST. amend. V:

> "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived life, liberty, or property, without due process of law; . . ."

U.S. CONST. amend. VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . ."

U.S. CONST. amend. VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Statement

The National Labor Relations Board by Decision and Order dated December 28, 1971, adopted the recommended

Order of the Trial Examiner below*, and found among other things, that Amalgamated Local Union 355 should:

1. Cease and Desist from:

* * * *

(c) In any other manner restraining or coercing employees of Vanella Buick Opel, Inc., *or any other employer* in the exercise of their right to self-organization, to form labor organizations, to join or assist labor organizations, to bargain collectively for representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities."* (TXD, L 37-43).

Thereafter, following an application for enforcement by the Board, the United States Court of Appeals for the Third Circuit, by Judgment Order dated April 3, 1973, on the sole issue of whether the Order below was too broad, determined "that the order of the Board is valid and proper and will be enforced."

The Trial Examiner's Decision states, in pertinent part,:

> "The evidence establishes that the strike of service department employees on February 10 and 11 was their own action. There is no evidence to support the suspicion of the General Counsel that the strike was instigated by either the Company or Amalgamated." (TXD 5, L 3-6).

Further, as to the charges themselves, it was found:

> "The violations here are perhaps more than technical, but their impact has been watered down to virtually nothing by the efforts of Respondents to mitigate their effect." (TXD 8, L 17-19).

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* References are to pages and lines in the Trial Examiner's Decision (TXD , L ,)

Reasons For Granting The Writ

I

Orders broadly drawn, and restricting Union or Employer activity which appear to establish a pattern of unfair labor practices, have been long-approved by this Court. *National Labor Relations Board* v. *Express Pub. Co.*, 312 U.S. 426 (1941). Conversely, when the requisite conduct has not been found, the scope of cease and desist orders have been severely limited. *Communications Wkrs. of America* v. *N.L.R.B.*, 362 U.S. 479 (1960). Recognition of apparently settled case law does not necessarily mean acceptance of its philosophies, point II, *infra.*

Specific objection is made herein to the apparent conflict between the decisions of the Third Circuit [*National Labor Rel. Bd.* v. *Newspaper & Mail Del. Union*, 246 F.2d 62 (1957); *N.L.R.B.* v. *Local Union 522, Lumber Drivers, ETC.*, 294 F.2d 811 (1961); *N.L.R.B.* v. *Highway Truck Drivers & Helpers, Local No. 107*, 300 F.2d 317 (1962); and *N.L.R.B.* v. *Local 542, International Union of Operating Eng.*, 329 F.2d 512 (1964)], which do not limit the use of a broad-based degree, and those of other circuits where restrictions are enforced.

In *N.L.R.B.* v. *Locals 138, 138 A, 138 B, Internat'l U. of Operating Eng.*, 377 F.2d 528, 530 (2d Cir. 1967), geographic limitations were imposed:

> "In such a case, an order which covers other employers and their employees in the area of the dispute is appropriate."

See also, N.L.R.B. v. *Miscellaneous Drivers & Helpers Local 610*, 293 F.2d 437, 441 (8th Cir. 1961):

> "we do not find that the respondent Union is bent upon other unlawful conduct or purpose covering all other employers within the territorial jurisdiction of the Union . . ."

The Sixth Circuit in *N.L.R.B. v. Teamsters, Chauffeurs, Help. & Taxi Dr., Loc. U. 327*, 419 F.2d 1282 (1970), clearly refused to enforce an order because of lack of specificity as to time, geographic area and persons to be affected. And see, *N.L.R.B.* v. *Teamsters, Chauffeurs, Help. & Taxi Dr., Loc. U. 327*, 432 F.2d 933 (6th Cir. 1970).

In the instant case, the proof adduced by the General Counsel and the Trial Examiner in support of the assertion that Amalgamated Local Union 355 had a "proclivity to violate the Act", is both remote in time and area. For example, the only case which took place within the Third Circuit, *N.L.R.B.* v. *Malcolm Konner Chevrolet, Inc.*, 338 F.2d 972, was decided in 1964, and concerned violations which took place in 1962. All of the other violations referred to in the Trial Examiner's Decision took place in the State of New York; most of these in the equally distant past.

Simply stated, the Third Circuit and the NLRB found, without adequate support in the record, that petitioner had a tendency to commit certain acts within the State of New Jersey. In addition, the Third Circuit and the Board, contrary to the findings of other courts, placed no reasonable limitations of time or of area in their cease and desist order.

II

> "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one." *Internat'l Long. Assn.* v. *Philadelphia Mar. T.A.*, 389 U.S. 64, 76 (1967).

In writing of NLRB orders it considered too broad to enforce, the First Circuit stated:

> "this exhibits a marked fondness on the part of the Board for broad decrees.
>
> * * * *
>
> On this substantial showing we must at least suspect that the Board uses the broad form of decree as a

> matter of course. This suspicion is confirmed by the Board's memoranda presently before us. We do not approve of such a practice." *N.L.R.B.* v. *Ochoa Fertilizer Corporation*, 283 F.2d 26, 29 (1960), *rev'd on other grounds*, 368 U.S. 318 (1961).

Continuing, the court concluded:

> "In fact, all that the Board really loses by our decision, is the *in terrorem* effect of a ready avenue to contempt proceedings, a result we hardly believe incompatible with the policy of the Act." 283 F.2d at 32.

Even the case cited by most NLRB attorneys seeking enforcement (*National Labor Relations Board* v. *Express Pub. Co.*, *supra*, at 436) states in this regard:

> "It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. But we think that without sacrifice of that principle, the National Labor Relations Act does not contemplate that an employer [union] who has unlawfully refused to bargain with his employees shall for the indefinite future, conduct his labor relations at the peril of a summons for contempt on the Board's allegation. . . ."

Just as a statute may not forbid the doing of an act in vague terms, *U.S.* v. *Mechanic*, 454 F.2d 849 (8th Cir. 1971), *cert. denied*, 406 U.S. 929 (1972), and will be stricken if it invites irrational and selective patterns of enforcement, *Joyce* v. *U.S.*, 454 F.2d 971 (D.C. Cir. 1971), so too is it a denial of due process to expose petitioner and his officers to the jeopardy of a contempt citation, when the actions prohibited are couched in generalized and apparently limitless terms. So too, punishment applied in pursuit of legitimate aims, may be cruel and unusual when it goes beyond that which is necessary to accomplish its purpose. *Dearman* v. *Woodson*, 429 F.2d 1288 (10th Cir. 1970).

The direct vice of an Order which is so broadly-based that it fails to establish guidelines is obvious; a collateral

problem arises because the very vagueness of the Order objected to may inhibit the rights of employees to select a labor organization. It is one thing to restrain the conduct of Amalgamated Local Union 355 as to Vanella Buick Opel; unfortunately, employees of "any other employer" may be discouraged and even intimidated by the Order, and choose another Union as a precautionary measure. Local 355 has organized nearly 300 shops and represents almost 6,000 employees. It is wrong and contrary to the spirit of the Act to prevent other workers from obtaining a bargaining agent of their choice.

All of the foregoing clearly applies to the predicament of Amalgamated Local Union 355. Petitioner has had its rights to organize employees severely limited in areas where there has been no pattern of violation of the Act, or where any unfair labor practices imputed to the Union occurred in the remote past. The Board has prepared an Order which is an example of overkill; it has banned almost the totality of normal labor activity when a selective and enforceable Order would have accomplished the purposes of the law and preserved the ideals of justice.

CONCLUSION

For the foregoing reasons, this petition for a *Writ of Certiorari* should be granted.

Respectfully submitted,

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Of Counsel:
ROBERT E. SCHER

May 30, 1973

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1388

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

against

VANELLA BUICK OPEL, INC., and
AMALGAMATED LOCAL UNION 355,

Respondents.

APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

Argued April 2, 1973
Before: ROSENN and HUNTER, *Circuit Judges*, and BECHTLE, *District Judge.*

Judgment Order

After considering the question whether the Board's order as applied to Local 355 is too broad,

It is ORDERED and ADJUDGED that the order of the Board is valid and proper and will be enforced. Costs taxed in favor of petitioner.

BY THE COURT,
MAX ROSENN
Circuit Judge

ATTEST:
THOMAS F. QUINN
Clerk

Dated: April 3, 1973

APPENDIX B

194 NLRB No. 123

UNITED STATES OF AMERICA
BEFORE THE NATIOAL LABOR RELATIONS BOARD

Cases 22—CA—4373
22—CB—1857

VANELLA BUICK OPEL, INC.[1]

and

AMALGAMATED LOCAL UNION 355 [2]

and

LOCAL 259, UNITED AUTOMOBILE WORKERS INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA[3]

Decision and Order

On September 23, 1971 Trial Examiner James M. Fitzpatrick issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, Respondent Union filed exceptions, and the General Counsel filed exceptions and a supporting brief, only with respect to the remedy.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[1] Hereinafter referred to as Respondent Employer.
[2] Hereinafter referred to as Respondent Union.
[3] Hereinafter referred to as Charging Party.

Appendix B

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the Respondent Employer, Vanella Buick Opel, Inc., Newark, New Jersey, its officers, agents, successors, and assigns, and the Respondent Union, Amalgamated Local Union 355, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Order.

Dated, Washington, D.C. Dec. 28, 1971

EDWARD B. MILLER, *Chairman*
JOHN H. FANNING, *Member*
RALPH E. KENNEDY, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Appendix B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Cases No. 22-CA-4373
22-CB-1857

VANELLA BUICK OPEL, INC.

and

AMALGAMATED LOCAL UNION 355

and

LOCAL 259, UNITED AUTOMOBILE WORKERS INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

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for the Charging Party.

Appendix B

TRIAL EXAMINER'S DECISION

Statement of the Case

JAMES M. FITZPATRICK, Trial Examiner: These consolidated proceedings under Section 10(b) of the National Labor Relations Act, as amended (the Act), arise from charges filed by Local 259, United Automobile Workers International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (herein called Charging Party or UAW) against Vanella Buick Opel, Inc. (herein called Respondent Employer or the Company) on February 26, 1971 and against Amalgamated Local Union 355 (herein called Respondent Union or Amalgamated) on March 8, 1971. Based thereon the General Counsel of the National Labor Relations Board on behalf of the Board issued a complaint on April 8, 1971 alleging violation of Section 8(a)(1) and (2) of the Act by the Company and Section 8(b)(1)(A) by Amalgamated. Both Respondents filed answers denying the commission of unfair labor practices. The issues posed were tried before me at Newark, N. J. on June 14, 1971.

Two issues are presented. The first, about which there is little controversy, is whether the Company recognized Amalgamated and whether the two negotiated and implemented a collective-bargaining agreement for company employees at a time when a representation proceeding was pending before the Board in which the results of a Board-conducted election had not yet been certified. The General Counsel contends that the Company thereby interfered with its employees' Section 7 rights contrary to Section 8(a)(1) and unlawfully assisted Amalgamated contrary to Section 8(a)(2), and that Amalgamated restrained and coerced the employees in violation of Section 8(b)(1)(A). The second issue, strenuously contested, is whether, assuming a

violation by Amalgamated is found, an extraordinary remedy as to it is warranted.

Upon the entire record, my observation of the witnesses, and consideration of the arguments of counsel, the brief of the General Counsel and a letter in the nature of a brief for Amalgamated, I make the following:

Findings of Fact

I. The Business of Respondent Employer

Respondent Employer, a New Jersey corporation, is engaged at Plainfield and Scotch Plains, New Jersey in the retail sale of automobiles and servicing of automobiles at the Plainfield location. During the calendar year of 1970 it received gross revenue in excess of $500,000 from the sale of products and services and received goods valued in excess of $500,000 directly from points outside New Jersey. See *Vanella Buick Opel, Inc.*, 191 NLRB No. 107.

II. The Labor Organizations Involved

Amalgamated and UAW are both labor organizations which admit to membership employees of the Company and which at times material to the present matter have purported to represent its employees. See *Vanella Buick Opel, Inc., supra.*

III. The Alleged Unfair Labor Practices

A. *Prior Events Involving the Company*

As found by the Board in *Vanella Buick Opel, Inc., supra*, UAW and Amalgamated in September 1970 began organizational campaigns among company employees culminating in a consent Board election on October 8, 1970

among the Company's service employees.[1] As a result of challenges filed to two ballots cast in that election, the Regional Director for Region 22 on October 30, 1970 issued a report on challenged ballots referring the matter to a trial examiner for hearing. It was then consolidated for hearing with unfair labor practice charges in the case cited above. After a hearing Trial Examiner James V. Constantine issued his Decision regarding the unfair labor practices, reported on the challenges, and severed the representation case, remanding it to the Regional Director with recommendations. The Board's decision in the unfair labor practice case is *Vanella Buick Opel, Inc., supra*, already referred to. The representation proceeding (22-RC-4745) was pending before the Board at the time of the events hereinafter referred to and at the time of the hearing herein.

B. *The Strike*

On the morning of February 10, 1971 employees in the Company's service and parts department went on strike. One of the employees, service writer Gary Fischer, stood outside the shop door as employees arrived beginning about 7:30 a.m. and announced that they were on strike. None went into work. They stood around or sat in their cars until later in the morning and then went home. No union agents were present. No picketing occurred and no picket signs were used then or the following day.

Sometime on February 10 Fischer put in a telephone call to the office of Amalgamated leaving a message for Business Agent Lester Horowitz to get in touch with him. When Horowitz received the message that evening he con-

[1] The election which was part of the proceedings in Case No. 22-RC-4745 was in a collective-bargaining unit consisting of all shop employees including service writers, parts men, porters, lubrication men, bodymen, polishers and mechanics, excluding all other employees, including office clerical employees, new and used car salesmen, watchmen, guards and supervisors as defined in the Act.

tacted Fischer by telephone and agreed to meet with the employees on the following morning.

On the morning of February 11 when the employees arrived at the shop at the normal time for commencing work they continued with the strike in the manner of the previous day. In mid-morning Horowitz arrived and conferred with them at a nearby luncheonette. He then proceeded, accompanied by a delegation of three employees including Fischer, to the Company's Scotch Plains location to confront company president Nicholas Vanella. Speaking for the group Horowitz told Vanella that the employees were on strike, that they did not wish to wait for a decision from the Board in the pending proceeding and that they wanted an immediate contract. Vanella replied that he could not deal with them because of the pending Board proceeding. But when Horowitz stated that the employees would not work until he negotiated, Vanella said that he would negotiate, but under duress, if the men would resume work during negotiations. Upon Vanella's assurance that the Company would negotiate, the employees, including two of the delegation meeting with Vanella, returned to work and the strike ended. Vanella and Horowitz, assisted by Fischer who remained with him, then discussed contract terms.

In the latter part of the afternoon of February 11 Horowitz returned to the shop where he again met with the employees. He reported to the assembled employees that the Company and Amalgamatd had agreed on the terms of a collective-bargaining agreement which he recited to them. These terms included, among other things, an increased hourly wage rate for mechanics from $4 to $4.75. The employees forthwith approved the terms arrived at and also selected Fischer to be the Amalgamated shop steward.

Appendix B

Thereafter mechanics received the increased wage rate. However no dues have been withheld for, or paid to, Amalgamated. Whether the agreed-upon terms were ever incorporated into a written contract does not appear. No written instrument was offered in evidence.

C. *Mitigation Efforts*

On February 26 the UAW filed the instant unfair labor practice charges against the Company and on March 8 those against Amalgamated. On March 16 all interested parties conferred at the Board's Regional Office regarding these charges. Three days later on March 19, Amalgamated's attorney Harold Dublirer wrote to company attorney David Kramer that, effective immediately, Amalgamated was withdrawing from the collective-bargaining agreement, would give no effect to it, would not act as a representative of the Company's service employees, and would not restrain or coerce these employees in the exercise of their Section 7 rights. He also requested that the Company post a copy of his letter in a conspicuous place at the shop. The same day Dublirer wrote the Board's Regional Office offering to settle the charges informally while rejecting a formal settlement which the Regional Office apparently was willing to accept. On March 22 he also wrote each of the employees in the service department repeating the statements made in his March 19 letter to the company attorney.

On behalf of the Company, attorney Kramer on March 22 wrote to the Regional Director stating, *inter alia*, that the Company would not recognize Amalgamated or any other union as the representative of its service department employees until such a union was certified by the Board, that the Company had not and would not give effect to the collective-bargaining agreement with Amalgamated,[2] that

[2] As noted previously, however, the Company has continued to pay the higher wage rate agreed to.

the Company would post the March 19 letter to the Company from Amalgamated's attorney, and stating the Company's willingness also to settle the unfair labor practice charges on an informal basis.

D. *Conclusions as to Unfair Labor Practices*

The evidence establishes that the strike of service department employees on February 10 and 11 was their own action. There is no evidence to support the suspicion of the General Counsel that the strike was instigated by either the Company or Amalgamated.

On February 11 Amalgamated in the person of Horowitz undertook to negotiate with the Company on behalf of these striking employees. At first the Company refused to negotiate because of the pending representation proceedings, but then under the threat that the strike would continue, agreed to negotiate on the condition that the servicemen return to work during negotiations. In this context contract terms were agreed upon and ratified by the employees that same day. At least one term of the new agreement, the 75-cent increase in mechanics' hourly wage rate, was implemented and continued in effect at the time of the hearing. The evidence does not establish what, if any, other terms were put into effect. Nevertheless, the agreement and the *de facto* representative status of Amalgamated remained in effect slightly over 5 weeks, from February 11 until March 19, when Amalgamated disclaimed the agreement and its representative status.

In negotiating with Amalgamated and concluding and at least partially implementing an agreement with it in the face of the pending representation proceeding in Case No. 22-RC-4745 in which the representation of these same em-

ployees was at issue and unresolved, the Company failed in its obligation to maintain a neutral position. Breach of this duty clearly infringed upon the employees' Section 7 rights and constituted an unfair labor practice. *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060. This same conduct rendered unlawful assistance and support to Amalgamated, a further unfair labor practice. It is no defense that it did so under duress of continued strike action.

For its part Amalgamated similarly restrained and coerced the employees regarding their Section 7 rights by negotiating for them and concluding and implementing an agreement at a time when the representation issue remained pending before the Board and it plainly had not been designated as their majority representative. In doing so Amalgamated also committed an unfair labor practice. *Fiore Brothers Oil Company, Inc.*, 137 NLRB 191, enfd. 317 F. 2d 710 (C.A. 2).

Conclusions of Law

1. The Company is an employer within the meaning of Section 2(2) engaged in commerce within the meaning of Section 2(6), of the Act. *Vanella Buick Opel, Inc., supra.*

2. Amalgamated and UAW are labor organization within the meaning of Section 2(5) of the Act. *Vanella Buick Opel, Inc., supra.*

3. By conduct set forth in section III, above, which has been found to constitute unfair labor practices, the Company interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and rendered unlawful assistance and support to Amalgamated, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) and (2) of the Act, and

Amalgamated restrained and coerced employees of the Company in the exercise of rights guaranteed in Section 7 of the Act and thereby engaged in unfair labor practices within the meaning of Section 8(b) (1) (A) of the Act.

4. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondents engaged in unfair labor practices, I will order them to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. The Company argues that it was caught in the middle and realistically should not be faulted for having dealt with Amalgamated under duress of a strike. Amalgamated urges that if it violated the Act, it was all a mistake. Both urge that in mitigation of their error they have already taken steps which have substantially remedied any unfair labor practices. Although there is a measure of merit in these positions, I conclude that issuance of a cease and desist order and posting of notices will provide greater assurance to employees and the public. In this connection I note that the record before me does not establish whether Amalgamated's disclaimer letter of March 19 was in fact ever posted in the shop. Also, in the interim there may have been some turnover in the employee complement. Posting of notices will advise all employees of the corrected position of both Respondents. Moreover, even if Respondents have in some measure corrected their unfair labor practices, because this administrative proceeding deals with public rights and policies, an official pronouncement in the form of a Board cease and desist order is appropriate to provide official resolution to whatever questions may persist in the minds of anyone involved.

Appendix B

Because Amalgamated on other occasions has engaged in unfair labor practices with respect to employers other than the company here involved, I shall issue a broad order designed to protect such employees. *Raymond Buick, Inc.*, 173 NLRB 1292, modified 182 NLRB No. 71, enfd. —F. 2d— (C.A. 2, June 24, 1971), 77 LRRM 2728.

The General Counsel urges a much more far reaching remedy as to Amalgamated. He seeks an order requiring Amalgamated to cease and desist from acting as the collective-bargaining representative of any employees of any employer whom it does not presently validly represent, unless and until the Board shall certify it as such representative, with the proviso that after it has been in effect for 5 years, Amalgamated may apply to the Board for release from such limitation upon a showing that during the intervening period it has conducted itself in such a manner that the limitation will no longer be necessary. This is essentially the remedy recommended by Trial Examiner Herzel H. E. Plaine in *Raymond Buick, Inc., supra*, which the Board did not adopt under the circumstances there present, particularly the length of time that had elapsed since previous Board adjudications of unlawful conduct by Amalgamated and the close factual and legal questions resolved in that case. The Board there said ". . . we do not believe the proposed remedy is warranted at this time." However, noting Amalgamated's past similar conduct and "its peculiar proclivity to be involved in collusive situations," the Board issued a broad order designed to protect the rights of employees of other employers not involved in that case. The Second Circuit in its decision of June 24, 1971 enforcing the Board's order, commented that "the remedies imposed by the Board were all fully within its power." (77 LRRM 2728).

Appendix B

The General Counsel in effect is saying that it is now time to take another look at Amalgamated's history of violations and to again consider the remedy recommended by Trial Examiner Plaine in *Raymond Buick*. The General Counsel cites the same Board cases involving Amalgamated that preceded *Raymond Buick* and were considered in that case. These were *Lundy Manufacturing Corp.*, 125 NLRB 1188; *Fiore Brothers Oil Co., Inc.*, 137 NLRB 191; *Salvirs Oil Co.*, 139 NLRB 25; and *Malcolm Konners Chevrolet, Inc., and Konner Chevrolet, Inc.*, 141 NLRB 541. He adds to this list the *Raymond Buick* case itself. But of course the findings in that case were before the Board when it was decided and its citation adds nothing new to the picture.

In addition he urges that since *Raymond Buick* Amalgamated has engaged in such further flagrant violations of Section 8(b)(1)(A) of the Act as to justify a conclusion that the picture has now changed and an extraordinary remedy, such as the Plaine remedy, is in order even though such was not deemed appropriate by the Board at the time of the *Raymond Buick* decision. No Board decisions as such are cited to support this contention. In a post trial motion the General Counsel urges that judicial notice be taken of a judgment in civil contempt issued July 12, 1971 by the United States Court of Appeals for the Second Circuit in *N.L.R.B.* v. *Amalgamated Local Union 355*, —F. 2d—, 77 LRRM 3082, in which Amalgamated and two of its named officials (not involved in the present matter) were adjudged in civil contempt. In that matter the Court of Appeals considered and approved in all respects the report and findings of its Special Master, John F. Dooling, Jr., United States District Judge for the Eastern District of New York, on October 23, 1970. *N.L.R.B.* v. *Amalgamated Local Union 355*, — Fed. Sup. —, 77 LRRM 2989. The General Counsel's motion also asks that judicial notice be

taken of the findings set out in the special master's report. At the hearing in the present matter, held prior to the issuance of the Court of Appeals' judgment in civil contempt, judicial notice of the special master's, report which had already been issued, was refused because of its lack of finality. The Court of Appeals having now adopted those findings, I grant the General Counsel's post hearing motion to take judicial notice of both the judgment in civil contempt and the report and findings of the special master. Amalgamated's opposition on the ground that in the contempt litigation it is seeking review by the United States Supreme Court is, in my view, without merit.

The Court of Appeals judgment in civil contempt and the findings of its special master which it adopts demonstrate additional violations of employee rights by Amalgamated and a continuation of its "peculiar proclivity to be involved in collusive situations" noted by the Board in *Raymond Buick*. The special master's findings deal with what may be described as collusive conduct by Amalgamated in regard to two employers, Robin Ford Sales, Inc., and Consolidated Petroleum Terminal, Inc. Neither of these situations appear to be directly involved in unfair labor practice cases before the Board. Both were situations involving "other employers" within the meaning of three broad orders issued by the Board and enforced by the Court of Appeals. In one of these, *N.L.R.B.* v. *Salmir Oil Co., et al.* (unreported) the Court's decree was entered by default. In the other two, *N.L.R.B.* v. *Richmond Rambler Sales, et al.*, and *N.L.R.B.* v. *Command Lincoln-Mercury Corp.*, (both unreported), Court decrees were entered by consent. None of the conduct complained of in the contempt proceeding involved employers, or employees of employers, named in these three cases.

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Nothing in the present case itself would justify the extraordinary remedy sought by the General Counsel. The violations here are perhaps more than technical, but their impact has been watered down to virtually nothing by the efforts of Respondents to mitigate their effect. For remedy purposes the present case adds little to that which was before the Board in *Raymond Buick*. Although the Court of Appeals, in its contempt judgment ordered Amalgamated to take various steps to purge itself of contempt, it did not include among those measures anything like the remedy which the General Counsel now seeks. If that higher authority has not availed itself of such stern measures, it is difficult to see how the same circumstances justify them in the present unrelated proceeding, the circumstances of which show it to be singularly frail vessel for the cargo which General Counsel would load upon it.

The remedy ordered by the Board (and approved by the Court), in *Raymond Buick* is some indication of what the Board deems appropriate. Considering that the proposed remedy was not adopted there, nor was anything like it included by the Court of Appeals among the measures required of Amalgamated to purge itself of contempt, and that the circumstances in the current case do not afford compelling reasons for an extraordinary remedy, I conclude that such is not appropriate. Accordingly I recommend a remedy similar to the Board's order in *Raymond Buick*.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[3]

[3] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and the Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Appendix B

Order

A. Respondent Vanella Buick Opel, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Recognizing Respondent Union, Amalgamated Local Union 355, as the representative of any of its employees concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment.

(b) Giving effect to the terms agreed upon in collective bargaining with Amalgamated Local 355 on February 11, 1971, or any modification, extension or renewal thereof; provided, however, that nothing in this Decision and Order shall require Respondent Employer to vary or abandon any wage or salary, hours, seniority, or other substantive feature of its relations with its employees, which it has established in the performance of such agreed terms, or to prejudice the assertion by employees of any rights they may have under those terms.

(c) Giving any other assistance or support to Amalgamated Local 355.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action to effectuate the policies of the Act:

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(a) Withdraw and withhold all recognition from Amalgamated Local 355 as the collective-bargaining representative of any of its employees concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms or conditions of employment, unless and until the Board shall certify Amalgamated Local 355 as such representative.

(b) Post at its premises at Plainfield and Scotch Plains, New Jersey copies of the attached notices marked "Appendix A" and "Appendix B."[4] Copies of the notice "Appendix A," on forms provided by the Regional Director for Region 22, after being duly signed by Respondent Employer's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to insure that said notices are not altered, defaced, or covered by any other material.

(c) Mail or deliver forthwith to the Regional Director for Region 22 additional signed copies of the notice "Appendix A," on forms provided by the Regional Director and signed on behalf of Respondent Employer as set out above for posting by Amalgamated Local 355 at its business offices and meeting halls in conspicuous places, including places where notices to members are customarily posted.

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[4] In the event that the Board's Order is adopted by a judgment of a United States Court of Appeals, the words in the notices reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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(d) Post and maintain at the same places and under the same conditions provided in paragraph A2(b) above, as soon as forwarded by the Regional Director for Region 22, copies of the notice marked "Appendix B."

(e) Notify the Regional Director for Region 22, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent Employer has taken to comply herewith.[5]

B. Respondent Union, Amalgamated Local Union 355, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Acting as the collective-bargaining representative of any of the employees of Respondent Employer, Vanella Buick Opel, Inc., unless and until the Board shall certify it as such representative.

(b) Giving effect to the terms agreed upon in collective bargaining with Vanella Buick Opel, Inc., on February 11, 1971, or any modification, extension or renewal thereof.

(c) In any other manner restraining or coercing employees of Vanella Buick Opel, Inc., or any other employer in the exercise of their right to self-organization, to form labor organizations, to join or assist labor organiza-

---

[5] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent Employer has taken to comply herewith."

tions, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Post at its offices and meeting halls copies of the attached notices marked "Appendix A" and "Appendix B." Copies of notice "Appendix B" on forms provided by the the Regional Director for Region 22, shall, after being duly signed by Respondent Union's representative, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail or deliver forthwith to the Regional Director for Region 22 additional signed copies of the notice "Appendix B," on forms to be provided by the Regional Director and signed on behalf of Amalgamated Local 355 as set out in the preceding paragraph, for posting by Vanella Buick Opel, Inc., at its premises in Plainfield and Scotch Plains, New Jersey, in conspicuous places, including all places where notices to employees are customarily posted.

(c) Post and maintain at the same places and under the same conditions as provided in paragraph B2(a) above,

as soon as forwarded by the Regional Director for Region 22, copies of the notice marked "Appendix A."

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of the receipt of this Decision, what steps Amalgamated Local 355 has taken to comply herewith.[6]

Dated at Washington, D. C.

JAMES M. FITZPATRICK
Trial Examiner

[6] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith."

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-284

AMALGAMATED LOCAL UNION 355,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD and
VANELLA BUICK OPEL, INC.,

Respondents.

SUPPLEMENTARY PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THRD CIRCUIT

SIDNEY O. RAPHAEL
Attorney for Petitioner,
770 Lexington Avenue,
New York, New York 10021
(212) 832-7700

Of Counsel:
ROBERT E. SCHER

August 22, 1973

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-284

AMALGAMATED LOCAL UNION 355,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD and
VANELLA BUICK OPEL, INC.,

Respondents.

SUPPLEMENTARY PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THRD CIRCUIT

Jurisdiction

The Judgment of the Circuit Court of Appeals was entered on April 3, 1973. On May 30, 1973, as set forth in the Affidavit of Louis Mark (Appendix A), forty copies of a Petition for a Writ of *Certiorari* herein were mailed and presumably received and filed by the Clerk of the Court.

Petitioner's attorney made a routine inquiry as to the status of the case on August 1, and learned on August 6, that neither the Petition nor any other documents had been received and filed by the Clerk of this Court. Accordingly, service was again made, and the case docketed on August 10, 1973.

Reasons for Accepting the Petition as Timely Filed

Petitioner anticipates that counsel for respondent will object to the jurisdiction of this Court. Even should no

objection be raised, petitioner believes that the Court is entitled to an explanation of the events which prevented the filing of the Petition within ninety days after entry of the Judgment Order. Further, and in keeping with our past practice, this Supplementary Petition will be served and filed as promptly as possible, just as we attempted to file the original Petition within sixty days, so as to demonstrate that Petitioner's actions are not for purposes of delay.

Our firm has engaged Mr. Mark (See Appendix A) for over thirty years, and to the best of my knowledge, we have never before had a situation wherein papers sent to a Court for filing were lost in the mail. Should the Justices of this Court determine that the Petition is without substantive merit, that is a fact which we and our client, a labor organization with approximately 7,000 members, must accept. However, if these and any prospective members are deprived of their right to a bargaining agent of their choice because of an error on the part of the Postal Service, then we believe that an injustice would be perpetuated.

CONCLUSION

For the reasons above noted, it is urged that the Writ of *Certiorari* mailed May 30, 1973 be filed *nunc pro tunc.*

Respectfully submitted,

SIDNEY O. RAPHAEL,
Attorney for Petitioner,
770 Lexington Avenue,
New York, New York 10021
(212) TE 2-7700

Of Counsel:

ROBERT E. SCHER
August 22, 1973

APPENDIX A

SUPREME COURT OF THE UNITED STATES

Affidavit

AMALGAMATED LOCAL UNION 355,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD and
VANELLA BUICK OPEL, INC.,

Respondents.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LOUIS MARK, being duly sworn, deposes and says:

1. I am Secretary-Treasurer of Lex Printing Company, Inc., 421 Hudson Street, New York, New York 10014.

2. I am a specialist in legal and financial printing and for over 30 years have printed briefs, records on appeal, and similar matters for law firms in the City of New York, and specifically for the attorneys for Petitioner herein.

3. On May 30, 1973, I mailed 40 copies of a Petition for a Writ of *Certiorari* in the above-captioned matter to the Clerk, Supreme Court of the United States, Supreme Court Building, Washington, D. C. 20543, together with proof of service of additional copies upon the National Labor Relations Board.

Appendix A

4. All of the foregoing were mailed by First Class Mail at the United States Post Office, 150 Christopher Street, New York, New York 10014.

5. On August 6, 1973, I was informed by my client, Robert Scher, Esq. of Raphael, Searles, Vischi, Scher, Glover & D'Elia, attorneys for Petitioner, that he had just learned from Deputy Clerk Lazowsky that his papers were not on file with the Supreme Court. Thereafter, one of my staff contacted Ms. Lazowsky on August 7, 1973 and she confirmed that an additional search had been made upon Mr. Scher's request and that the 40 copies heretofore mailed had still not been located. She suggested that service be effected again and that I prepare this affidavit setting forth the foregoing facts.

(Sworn to before me this 9th
day of August, 1973.)

/s/ Louis Mark

QUINTON C. VAN WYNEN
Notary Public, State of New York
No. 24-4087465
Qualified in Kings County
Commission Expires March 30, 1975

SUPREME COURT, U. S.
SEP 25 1973

No. 73-284

In the Supreme Court of the United States

OCTOBER TERM, 1973

AMALGAMATED LOCAL UNION 355, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-284

AMALGAMATED LOCAL UNION 355, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The judgment of the court of appeals (Pet. App. 1A) was entered on April 3, 1973. The 90-day period for filing a petition for a writ of certiorari prescribed in 28 U.S.C. 2101(c) expired on July 2, 1973. No timely extension of time for petitioning was sought, and the petition was filed on August 10, 1973. The petition is untimely, the Court has no jurisdiction to entertain it,[1] and it should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1973.

[1]Since the failure to file on time is jurisdictional, the explanation for such failure given in petitioner's supplementary petition is irrelevant.